

Session 19

**Exercise of Police Power and Its Effect of the  
Success of Criminal Prosecution**

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## **THE EXERCISE OF POLICE POWERS AND ITS EFFECTS ON CRIMINAL PROSECUTIONS**

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This discussion on the constitutional dimension of effective prosecutions will adopt this 'liberal' approach instead of the restrictive approaches taken by certain other judicial decisions.<sup>5</sup>

What can be derived from this approach and a reading of the cases cited earlier is the fundamental assertion that the constitution confers upon a person charged with a criminal offence the right to a fair trial. The right to a fair trial does not confine itself to the proceedings in court but all processes prior and subsequent to that.

One of the rights that come with a fair trial is the right to be tried on evidence not obtained through violation of any of his fundamental rights. This means the accused has a right not to be tried on unlawfully obtained evidence. The basis of this right is that the Police should not be given the free hand to obtain evidence through breaches of the fundamental rights of the accused and the Courts should not act on such evidence as this would tantamount to a fundamental breach of the Rule of Law.

The Malaysian Courts have initially adopted a very restrictive approach to this question by approving the proposition in *Kuruma v The Queen*<sup>6</sup> that evidence that has been illegally obtained does not affect the question of its admissibility.<sup>7</sup> If it is relevant it is admissible and the court is not concerned with how the evidence is obtained. However in *Goh Ching Ang v Public Prosecutor*,<sup>8</sup> the Federal Court considered the effect of information obtained under Section 27 of the Evidence Act which was not voluntarily made. In deciding that the evidence should be removed and the conviction quashed Chong Siew Fai CJ said:

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<sup>5</sup> See the discussion on this and the relevant judicial decisions, in Cyrus Das, "Life" under Article 5 : What Should It Be?", INSAF (2002) XXXI No. 4, 68.

<sup>6</sup> [1955] 1 All ER 236.

<sup>7</sup> See the case of *Public Prosecutor v Seridaran* [1084] 1 MLJ 141.

<sup>8</sup> [1999] 1 MLJ 507.



"Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining Section 27 information are scrupulously followed in the Police Station".

The Federal Court was swayed by the decision in *Haw Tua Tan v PP*<sup>9</sup> which relied on the provisions of fairness found in Articles 9(1) and 12(1) of the Constitution of Singapore which is similar to Articles 5(1) and 8(1) of the Malaysian Federal Constitution.

The right to a speedy trial is also a right that can be derived from Article 5(1). The right to fair trial must include the right not to be held in detention awaiting trial, any longer than is necessary. In the case of *Public Prosecutor v Choo Chuan Wang*,<sup>10</sup> Edger Joseph Jr J held that Article 5(1) does imply that the accused has the right to a fair hearing within a reasonable time. He quoted from an Indian Supreme Court decision of *Madheshwardhari Singh v State of Bihar*<sup>11</sup> which should be the corollary of the stand taken in *Choo Chuan Wang*. The Indian Supreme Court held:

"That once the constitutional guarantee on a speedy trial and the right to a fair, just and reasonable

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<sup>9</sup> [1981] 2 MLJ 49.

<sup>10</sup> [1992] 2 CLJ 1242.

<sup>11</sup> [1986] (Pat) 324.



procedure under Article 21 [similar to our Article 5(1)] has been violated, then the accused is entitled to an unconditional release and the charges leveled against him would fall to the ground".<sup>12</sup>

In order for the judge to make such an order Edgar Joseph Jr J held that the accused must allege some kind of prejudice as a result of the delay, such as witnesses becoming untraceable, or incapable of giving evidence, evidence being lost or destroyed, or any other prejudice that may occur.

Article 5(3) contains two very important rights of the accused which may invalidate the case against him if these rights are not protected. Article 5(3) states that:

"Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice".

On the first right of the accused being informed as soon as may be of the grounds of his arrest, the non-disclosure or the delay in informing these grounds will invalidate that arrest. This was stated by the Court in *Yit Hon Kit v Minister of Home Affairs*.<sup>13</sup> What would amount to a proper disclosure of the grounds of arrest was explained in the case of *Chong Kim Loy v Timbalan Menteri Hal Ehwal Dalam Negeri*.<sup>14</sup> The judge said:

"... the right is to be informed at the earliest possible moment, not in detail and not necessarily in strict legal terminology, but only in general terms, by virtue of what power he is being arrested and of the grounds of his arrest. But, enough must be made known to

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<sup>12</sup> [1992] 2 CLJ at 1245.

<sup>13</sup> [1988] 2 MLJ 638. See also the decision of *Abdul Rahman v Tan Jo Koh* [1968] 1 MLJ 205.

<sup>14</sup> [1989] 3 MLJ 121.



him to afford him the opportunity of giving an explanation of any misunderstanding ...”<sup>15</sup>

The second right is the right to counsel which includes two situation ie consultation at the Police Station upon arrest and legal representation in court. The oft-quoted legal position on these rights is found in the case of *Ooi Ah Phua v Officer-in-Charge, Criminal Investigation Kedah/Perlis*<sup>16</sup> where the Federal Court held that:

“The right of an arrested person to consult his lawyer begins from the moment of arrest but the right cannot be exercised immediately after arrest. ... The right should not be exercised to the detriment of any investigation by the Police”.

The position is such that a balance has to be struck between the right of the arrested person to consult his lawyers on the one hand and on the other, the duty of the police to complete investigations and to protect the public, witnesses and evidence from the wrongdoers. The burden to show the need and justification for the delay in the right to counsel is always on the police. If this burden is not discharged, the validity of the arrest may be challenged.

In the remarkable decision of *Abdul Ghani Haroon v Ketua Polis Negara*,<sup>17</sup> Justice Hishamudin Yunus delivered a stirring decision for the rights of the accused and in this case detainees who were detained under the Internal Security Act 1960. The Court in deciding the detention to be invalid and in granting *habeas corpus*, detailed the strict requirements of the Federal Constitution with regards to Article 5(3). The Court even declared that the denial of access to family members was a breach of the detainees' fundamental rights and rendered the detention mala fide. The judge said:

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<sup>15</sup> *Ibid.*, 127.

<sup>16</sup> [1975] 2 MLJ 198. See also *Hashim bin Saud v Yahya bin Hashim & Anor* [1977] 2 MLJ 116.

<sup>17</sup> [2001] 2 MLJ 689.



"The law, especially a law that affects fundamental rights, should not be enforced blindly. It must be interpreted and carried out as humanely as possible".<sup>18</sup>

On the denial of access to lawyers, the court proclaimed:

"The denial of access to lawyers is not only a gross violation of the fundamental rights as enshrined in the Constitution but has also greatly prejudiced the applicants in the present application. For example, consider this aspect. The arresting officer in their respective affidavits have averred that they have informed the applicants of the grounds of arrest as soon as possible after the arrest. In other words, the claim is made that they have complied with the first limb of Article 5(3). How is this Court to verify, these claims? This Court can only take a fair judgment after having had the benefit of not only scrutinizing the affidavits of the respondent but also the affidavits of the detainees as well. It is elementary justice that the Court has to hear both sides. But then there are no affidavits deposed by the applicants. And it is due to no fault of theirs: there are no affidavits filed by them simply because right until the last day of hearing, a period of about 40 days, the lawyer and family members have been denied access to them. Thus the denial of access to lawyers has led to injustice. [The Senior Federal Counsel] has submitted that the denial of the right to counsel is permissible as long as investigation is ongoing. With respect, whatever might be the allegations against them it is clearly unlawful to deny them of the constitutional guarantee for such a long period. Those police officers responsible for the detention of the applicants must wake up to the fact that the supreme law of this country is the Constitution and not the ISA".<sup>19</sup>

In *Ramli bin Salleh v Inspektor Yahya bin Hashim*<sup>20</sup> the Court summarized the rules pertaining to Article 5(3):

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<sup>18</sup> [2001] 2 MLJ 704.

<sup>19</sup> [2001] 2 MLJ 706.

<sup>20</sup> [1973] 1 MLJ 54.



"(1) That the right of a person who is arrested and remanded in police custody, to consult and be defended by a legal practitioner of his own choice as envisaged in Clause (3) of Article 5 of the Constitution, begins right from the day of his arrest even though police investigation has not yet been completed;

(2) That in order to satisfy the constitutional requirement of Clause (1) of Article 5 that right should be subject to certain legitimate restriction which necessarily arise in the course of police investigation, the main object being to ensure a proper and speedy trial in the court of law;

(3) That such restriction may relate to time and convenience of both the police and the person seeking the interview and should not be subject to any abuse by either party;

(4) That in order to render such interview effective it should be held not within the hearing of any member of the police though within their sight;

... (6) That it should therefore be understood that the police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right".<sup>21</sup>

Thus, the effectiveness of a prosecution has got to be dependant on the validity of the trial process in constitutional terms. A prosecution can in no logical terms be considered effective if it fails the constitutional test.

### **The Criminal Procedure Code (Amendment) Act 2006**

In 2006, Parliament passed the Criminal Procedure Code (Amendment) Act 2006. In relation to the powers of the police to arrest, a new section 28A was

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<sup>21</sup> [1973] 1 MLJ 56-57.



passed. This section outlines several rights that a person arrested has upon his arrest.

**a. Right to be informed of the grounds of his arrest.** Section 28A(1) provides that where a person is arrested without a warrant, he shall be informed as soon as may be of the grounds of his arrest by the officer making the arrest. This is merely a restatement of the constitutional right provide for by Article 5 clause (3) of the Constitution. Section 28A is admittedly restricted to arrest without warrant, but presumably the same principles relating to the application of this right as established by case law<sup>22</sup> in relation to the constitutional right under Article 5 clause (3) would also apply.

**b. Right to consult a legal practitioner.** This is provided by subsection (2) of section 28A. According to this section, 'a police officer shall before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may communicate or attempt to communicate and consult with a legal practitioner of his choice.'

This is akin to the *Miranda* warning where in the United States of America, a suspect must be informed of this rights and all police investigation must stop until legal representation is made available.<sup>23</sup>

This represents a significant change from the position before the amendments. In interpreting the constitutional rights of a person arrested, the Courts had indicated that the police is under no obligation to inform the person of his right to consult a legal practitioner of his choice.<sup>24</sup>

Subsection (3)(a) further provides that 'where the person arrested wishes to communicate or attempt to communicate with a legal practitioner, the police officer shall, as soon as may be, allow the arrested person to do so.' The police is also to provide reasonable facilities for the said communication and

<sup>22</sup> See for instance *Christie & Anor v Leachinsky* [1947] 1 All ER 567

<sup>23</sup> *Miranda v Arizona* (1966) 86 Supreme Court 1602. See also s.24, 28, 56, 58 of PACE 1984.

<sup>24</sup> See for instance *Lee Mau Seng v Minister of Home Affairs, Singapore & Anor* [1971] 2 MLJ 137



consultation free of any charge to the arrested person. Any consultation with a legal practitioner under this new provision must however be made within the sight of a police officer, but 'as far as practicable their communication will not be overheard' by the police. This too is merely a restatement of principles established by case law. In *Ramli b Salleh*<sup>25</sup> it was recommended that the meeting of the person arrested and the legal practitioner should be 'within sight but without earshot' of the police.

Clearly, the most significant provision of this section is that the person arrested cannot be asked any form of questioning or to record any statement until he has been allowed to communicate and consult with the legal practitioner of his choice. According to subsection (2), 'a police officer *shall before commencing any form of questioning or recording of any statement from the person arrested*, inform the person that he may communicate and consult with a legal practitioner of his choice'. This is further reiterated in subsection (3)(d) which states that any questioning or recording of any statement from the person arrested by the police shall be deferred 'for a reasonable time until the communication or attempted communication....or consultation....has been made'.

This is apparently a move away from the dictum of Suffian LP in *Ooi Ah Phua* that although 'the right of an arrested person to consult his lawyer begins from the moment of arrest....that right cannot be exercised immediately after arrest....'

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<sup>25</sup> [1973] MLJ 54



However, reading further the provisions in section 28A indicates that this might not be the case. It seemed that the 'balance that need to be struck between the right of the arrested to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers...' is retained. Subsection (4) provides that the right to communicate and consult a legal practitioner before any form of questioning or recording of statement does not apply in three situations.

Firstly, where 'the police officer reasonably believes that compliance....is likely to result in an accomplice of the person arrested taking steps to avoid apprehension'. Secondly, if it might result in the 'concealment, fabrication or destruction of evidence or the intimidation of a witness'. And thirdly, where the police officer reasonably believes that 'having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed'. This appears particularly crucial in cases of kidnappings and the like.

Thus, there may be instances where the right as envisaged by the new provisions are not exercisable immediately upon arrest. Although this might mean that in substance, the principles laid down in *Ooi Ah Phua* remain to a certain degree, the amendments are nevertheless a step forward. This is because in order to invoke the said subsection (4), the police officer concerned needs to obtain authorization from a police officer not below the rank of Deputy Superintendent of Police. The above-mentioned police officer giving such authorization must, when giving the authorization, record the grounds of belief the applicant police officer that the sub-section (4) applies in that particular case. This, apparently is seen as a means to check or supervise the actions of the police officer conducting the investigation, so as to not infringe upon the rights of



the person arrested, so as to ensure that any subsequent criminal prosecution against the said person arrested would not be met with failure, or jeopardized as a result of the accused's right being breached.

This aim could however only be met, if the utilization of sub-section(4) is used only sparingly, and in cases which genuinely demands it, and not as a norm for most cases. It would certainly defeat its purpose if the practice is to have some form of standard paperwork prepared for all cases, where police officers just need to fill in some blank spaces, and authority given as a matter of course. Each case needs to be considered on its merits.

The amendments also introduces a refreshing new provision as far as Malaysian Criminal Justice is concerned<sup>26</sup>, by giving the person arrested a right to communicate with relative or friend to inform of his whereabouts upon his arrest. This surely is an attempt to do away with complaints from relatives and friends of persons arrested that they are denied information about the whereabouts of the person arrested, and hence the difficulty of trying to communicate with them as well as for the person arrested to communicate and consult with a legal practitioner.

### **Order for further detention of persons arrested**

There were also amendments made to section 117 of the Criminal Procedure Code. Under this section, a Magistrate is empowered to order that a person be detained for a period of up to fifteen days for the purpose of enabling the police to complete their investigations into the case for which the person was so arrested.

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<sup>26</sup> see s 56 of PACE 1984



Under the new sub-section (2) of section 117, the powers of the Magistrate to authorize the further detention of the person arrested depends on the nature of the offence which is being investigated. Accordingly, 'if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and not more than three days on the second application'. On the other hand, if the offence in question is one that 'is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application'.

The changes this new provision brings to the administration of criminal justice in Malaysia is that, it seemed, only two applications may be made for an order under this section. Simple arithmetic will then show that for an offence punishable with imprisonment of less than fourteen years, the maximum period for which a person can be detained under that section is seven days as opposed to the fifteen previously provided. Similarly, for an offence punishable with death or imprisonment of fourteen years or more, the maximum period for such detention is fourteen days. The fact that only two applications may be made means that there may be cases where the police might not be able to obtain the maximum detention order prescribed. For instance, in a case where the person arrested was being investigated for the offence of murder, the Magistrate is at liberty to order his further detention for a period of say, five days, on the first application. In the event that it turns out the police need a longer period to investigate, then on the second application, the Magistrate could only order a maximum of seven days for further detention. This would mean that the investigation authority is 'deprived' of the two days, for which they could have detained the person arrested to assist in their investigation into the case. At first blush, this might seem favourable to the person arrested. However, let us not forget that, a realization of this so called 'deprivation' of the maximum days envisaged by the section could lead to Magistrate taking the 'safer' option of



ordering the maximum days of detention allowed for any one application. It goes without saying too, that the police would naturally make an application for the maximum number of days allowed.

Two other changes in respect of these proceedings is that the Investigation Officer is required to state in his investigation diary required for such application, 'any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application'. This is clearly to prevent the so-called application for 'chain-smoking' orders.

Secondly, in deciding the period of detention of the accused, he shall be allowed to make representations, either by himself or through a counsel of his choice. This is Parliament's confirmation of the right already accorded to the accused in *Saul Hamid*.<sup>27</sup>

### **Statements recorded by accused persons to the police**

One other significant amendment to the Criminal Procedure Code is the introduction of the new section 113(1). According to this section, '....no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used as evidence'.

This means that, except in a limited number of cases, the prosecution could no longer admit as evidence statements made by an accused person to the police. Statements of accused persons, cautioned or otherwise, had previously been one of the most often used pieces of evidence against the accused in the case against him. It does tend to prolong trials because more often than not, the admissibility of the statements would be challenged, requiring the court to adjourn the main trial and hold a *voir dire*. The prosecution has to prove that the statements were given by the accused without any unfair practice on the part of the police. In the words of the previous section 113, it must be made 'without any

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<sup>27</sup> [1999] 6 MLJ 800



inducement, threat or promise' from the police. In a fair percentage of cases, it forms the main evidence against the accused, and when the admissibility of the statement is successfully challenged by the defence, because of unfair treatment from the police, the prosecution would find that there are no other evidence of sufficient probative value to get a conviction. The prosecution is also wary of the possibility that investigating officers would 'stop investigating' once they have obtained a statement in the form of a confession from the accused, or to verify the truth of the contents of such statements. The new amendment would to a certain degree put an end to this form of investigation. The downside to this is of course that the section only applies to statements given to a police officer 'in the course of an investigation under this chapter'. It does not apply therefore to investigations relating to offences where there are specific laws governing admissibility of statements from accused persons, say for instance under the Dangerous Drugs Act or the Internal Security Act.

## Conclusion

It is clear that a wrongful arrest or detention does not affect the jurisdiction of courts or the validity of criminal proceedings against the accused person, and neither would unlawfully obtained evidence necessarily be rejected by the courts if it is relevant, it is without doubt that the courts have paid particular attention to the fact that fairness in the exercise of police powers do have a bearing on whether the prosecution would succeed in its case against the accused. To this approach by the courts are now added the undeniable attempt by Parliament, as can be seen from the amendments to the Criminal Procedure Code, to ensure that when the police exercises their powers, particularly in relation to arrests and detention of persons, it should be exercise fairly and without prejudice to the arrested person's rights.<sup>28</sup> Although, these amendments are to a certain degree restatements of principles already established by case law, and despite of certain

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<sup>28</sup> Another significant amendment showing this trend of fairness to the accused, which is not within the scope of this paper is the new section 51A. See also the principles enunciated in, for instance, *Raymond Chia* [1985] 2 MLJ 436.



possible shortcomings as discussed earlier, acknowledgement of the noble objectives of Parliament, and to the Attorney-General's Chambers and the Bar, and all those involved in the provision of these safeguards is in order.

## Conclusion

It is clear that a wrongful arrest or detention does not affect the jurisdiction of courts or the validity of criminal proceedings against the accused person, and neither would unlawfully obtained evidence necessarily be rejected by the courts. If it is relevant, it is without doubt that the relevant facts and circumstances are



## **THE EXERCISE OF POLICE POWERS AND ITS EFFECTS ON CRIMINAL PROSECUTIONS.**

The police have extensive powers and an important role to play in the administration of criminal justice. Sir Robert Peel, generally acknowledged as the founder of the British system of policing once stated that 'the basic mission for which the police exist is to reduce crime and disorder.' The United Kingdom Police Service Statement of Common Purpose declared that 'the purpose of the police service is to uphold the law fairly and firmly; to prevent crime; to pursue and bring to justice those who break the law; to keep the peace; to protect, help and reassure the community; and to be seen to do this with integrity, common sense and sound judgment'.

The prosecution, as the term suggest, have a duty to prosecute offenders in criminal proceedings. To a large degree, the prosecution relies on the work and exercise of police powers of investigation, such as powers of arrests, search, and recording of statements from witnesses as well as accused persons and gathering of evidence, to be able to successfully prosecute criminals. This paper looks at exercise of police powers, particularly in relation to arrests and detention of suspected offenders of crimes and how successful prosecutions of these offenders might be affected if the powers of the police are not exercised fairly. It will highlight the concerns by the courts that police powers should be exercised fairly and how that same sentiment is echoed by Parliament as evidenced by the amendments to the Criminal Procedure Code in 2006.

## **THE CONSTITUTIONAL DIMENSION**

It would be a trite observation to say that constitutional provisions have to be adhered to in a criminal prosecution. The principles of the Rule of Law are recognized in the Federal Constitution and thus the validity of a criminal



prosecution would be dependent on an adherence to those constitutional provisions.<sup>1</sup> The relevant constitutional provisions are found in Article 5 of the Federal Constitution and it is in these provisions that the accused has recourse to in challenging the constitutional validity of his prosecution.<sup>2</sup>

Article 5(1) is a provision which brings with it a myriad of avenues for constitutional rights. It provides that 'No person shall be deprived of his life or personal liberty save in accordance with law.'

The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan*<sup>3</sup> provided us with an approach that opens up the possibilities of Article 5(1). Gopal Sri Ram JCA adopted, it is submitted a more constitutional approach when he said:

"In my judgment, the Courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should when discharging their duties as interpreters of the supreme law adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in Article 5(1) is given a broad and liberal meaning".<sup>4</sup>

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<sup>1</sup> See the Privy Council decision of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 and in Malaysia *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113.

<sup>2</sup> Article 5 contains provisions pertaining to:

- Deprivation of life and liberty except in accordance with law *habeas corpus*.
- *Habeas corpus*
- Right to be informed of grounds of arrest and to be allowed access to a lawyer and be defended by one.
- Right to be produced before a magistrate within 24 hours of arrest.

<sup>3</sup> [1996] 1 MLJ 261.

<sup>4</sup> *Ibid.*, 288. This followed the dynamic approach of Indian decisions on the matter such as *Maneka Ghandi v Union of India* AIR 1978 SC 597 which decided that rights must be given an expansive interpretation.



